STATE OF MARYLAND
GOVERNOR'S COMMISSION TO REVISE
THE ANNOTATED CODE
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COMMISSION REPORT NO. 7

TO THE GENERAL ASSEMBLY OF MARYLAND

SUBJECT: Revised Article on Real Property

I. CONTINUATION OF CODE REVISION.

The Real Property Article is a result of the continuing revision of the Annotated Code of Maryland undertaken by the Commission to Revise the Annotated Code. This process was inaugurated during the First Extraordinary Session of 1973 when the Agriculture, Courts and Judicial Proceedings, and Natural Resources Articles were enacted. The three bills became effective on January 1, 1974. The three articles were a formal revision as mandated by the guidelines established by Governor Mandel in July 1970 and included an improved scheme of organization, elimination of obsolete or unconstitutional provisions, resolution of inconsistencies and conflicts in the laws, and general improvement of language and expression. A more detailed description of the purposes of Code revision and the complete revision scheme is contained in the Revisor's Manual of the Governor's Commission to Revise the Annotated Code (Second Edition - 1973). Copies of the Manual may be obtained in the offices of the Secretary of the Senate and the Chief Clerk of the House who will furnish one to any member on request.

The basic thrust of the Commission's work is formal and not

substantive changes. Nevertheless, at some points in its work, it becomes necessary to make recommendations which involve the substance of the laws. In a sense, the elimination of an obsolete provision is a substantive change. Also, where the Commission has discovered inconsistencies or gaps in the laws, it sometimes has made substantive recommendations in an effort to rectify the situation. This follows the Governor's directive to eliminate inconsistencies and conflicts.

In every such case, the revisor's notes attached to the appropriate section explain the change and the reasons for it. Changes of this kind also are noted in this report.

Sometimes the Commission identified problems involving such fundamental policy that it felt that they should be called to the attention of the General Assembly for action. These problems also are mentioned in the revisor's notes and in this report.

II. FORM OF REVISION BILLS.

The revised articles introduced during the 1974 regular session of the General Assembly conform to the organizational format and numbering system used in the previously revised articles. Accordingly, they will be published as separate volumes and will be cited by name or appropriate abbreviation.

Within each article, a standard numbering system is used. This consists of one or more digits to the left of a dash; and three or more digits to the right of a dash; essentially the same system now used in present Articles 21, 66 1/2, 93, and 95B of the Code.

The number or numbers to the left of the dash designate the title within the article. The first number or numbers to the right

of the dash designate the subtitle. The remaining digits designate the section within the subtitle. Thus, §1-302 of the Real Property Article is the second section in Subtitle 3 of Title 1 of that article.

The Code revision bills introduced at the 1974 session reflect this system of organization and numbering. Each bill is arranged in a similar format. Section 1 of the bill consists of the proposed revised article. The text of each article is printed in all capital letters as though it were all new material, but in most instances references to the present Code indicate that changes are largely stylistic.

Each section or subsection of the proposed revised article is followed by a revisor's note which explains the changes, if any, made with respect to present law. These notes facilitate comparison of the revised article with the present law. It shows the relationship between present and proposed Code provisions and vice versa.

Each revised article, if enacted, becomes effective on July 1, 1974.

III. THE REAL PROPERTY ARTICLE.

This report is concerned specifically with the proposed Real Property Article. The proposed article incorporates all provisions of the public general laws relating to real property. It includes all of present Article 21 and sections of Articles 9, 36, and 57.

The revised article makes comparatively few revisions in Article 21 which was revised in 1972 by the Code Revision Committee of the Section of Real Property Planning and Zoning of the State Bar Association. The 1972 revision represented a herculean undertaking

by the State Bar Association. At that time, the provisions of the Code relating to real property were scattered throughout several articles. The Code Revision Committee reorganized these provisions into 15 titles in Article 21 and made stylistic and clarifying changes.

As a result of this revision, the Commission has made comparatively few changes in the revised article. Generally speaking, the 1974 revision of this article is primarily stylistic with some organizational changes. In some instances, such as Title 8, Subtitle 4,and Title 11, the Commission made no changes, stylistic or otherwise, because an effective revision of the current law necessarily would require substantive changes involving fundamental policy questions as well as stylistic and organizational changes. With regard to Title 11 (Horizontal Property Act), the Code Revision Committee of the State Bar Association has prepared legislation completely revising this title to be introduced during the 1974 Legislative Session. If enacted, this bill will replace present Title 11.

Article 21 contains some very helpful comments prepared by the Code Revision Committee of the State Bar Association at the time of the 1972 revision. The Commission intends to request the Michie Company to retain these comments in the new article.

Like Article 21, the Real Property Article is divided into 15 titles each of which is discussed in detail below:

Title 1 - General Provisions

Title 2 - Rules of Construction

Title 3 - Recordation

Title 4 - Requisites of Valid Instruments

Title 5 - Statute of Frauds

Title 6 - Rights of Entry and Possibilities of Reverter

Title 7 - Mortgages, Deeds of Trust, and Vendor's Liens

Title 8 - Landlord and Tenant

Title 9 - Statutory Liens on Real Property

Title 10 - Sales of Property

Title 11 - Horizontal Property Act

Title 12 - Eminent Domain

Title 13 - Land Patents

Title 14 - Miscellaneous Rules

Title 15 - Effective Date and Applicability

A more detailed outline of the article showing sections accompanies this report.

The Code Commission staff prepared the initial draft of each title. The principal draftsmen were Sharon K. Tucker, Associate Revisor and David L. Anderson, Assistant Revisor. Alan V. Cecil, Legislative Assistant, also aided in some of the early drafting. The draft then was submitted to a Commission subcommittee chaired by Shale D. Stiller, Esq. and comprised of Roger D. Redden, Esq., Doris P. Scott, Esq., and Melvin J. Sykes, Esq. Charles T. Albert, Esq., served as an advisor to the Committee.

A legislative consulting committee selected by the President of the Senate and the Speaker of the House attended the Subcommittee meetings and reviewed each draft with the Subcommittee members and the staff.

This procedure was followed because time considerations did not permit Legislative Council joint committee hearings similar to

those held on the Courts and Natural Resources Articles. Since the Commission had found these Legislative Council hearings frequently revealed drafting problems the Commission had not anticipated, a legislative consulting committee was appointed so that the benefit of legislative input could be achieved at the subcommittee level.

Members of the legislative consulting committee included: Senator John J. Bishop, Senator Edward T. Conroy, Senator J. Joseph Curran, Delegate Carter M. Hickman, Delegate Maurice Weidemeyer, Senator William A. Wilson, and Delegate John W. Wolfgang.

Following subcommittee approval, the drafts were submitted to the full Commission for its consideration.

The Code Revision Committee of the State Bar Association also was consulted when particular problems arose that necessitated detailed consideration. In addition, attempts were made during the drafting process to confer with governmental agencies administratively concerned with a particular title. For example, the Archivist and the Special Assistant Attorney General assigned to the Hall of Records Commission were consulted on Title 13 - "Land Patents."

IV. DETAILED DESCRIPTION OF THE REAL PROPERTY ARTICLE.

A. Title 1 - General Provisions.

1. Definitions.

Section 1-101 sets forth the definitions that are applicable to the entire article. The major revision here is the addition of new definitions to clarify the use of certain terms in the article. For example, a definition of "grant" (§1-101(e)) is added to indicate explicitly that the noun "grant" and the verb "to grant" as used

in this article include the common law definitions of "conveyance," "assignment," and "transfer" and their verb forms. This definition is necessary because at common law these three terms have different meanings which are not intended to be changed by this definition.

The definitions of "purchaser" (§1-101(m)) and "vendor" (§1-101(n)) are new language and added to indicate explicitly that these terms also include the common law definitions of "buyer" or "vendee" where the term "purchaser" is used and "seller" if the term "vendor" is used. Although present Art. 21 uses all these terms, the Commission decided that consistent use of "purchaser" and "vendor" would be preferable.

The present definition of "lease" (§1-101(h)) is revised so that it includes any lease whether oral or written, express or implied. Although the singular of "sublease" is used in the definition, it is intended to include more than the first sublease but also subsequent subleases. When the Code Revision Committee revised this article in 1972, it intended that the definition of "lease" in Art. 21 include express or implied and oral or written leases. Subsequently, some question has arisen concerning whether the present definition included all types of leases, particularly in light of §8-401(a) which relates to "any lease of property, express or implied, oral or written." Other provisions of Title 8 (Landlord and Tenant) referring to "rental agreements" have been construed to relate to both oral and written leases. For this reason, the Commission decided that inclusion of this definition of "lease" would alleviate any ambiguity in §1-101(h). In addition, all present terms or phrases in the article that are synonymous with this definition, such as "rental agreement", are proposed for deletion and "lease" is

substituted.

Finally, the definition of "person" is new language and sets forth a broad definition that is identical to the definition used in the Agriculture Article and the Natural Resources Article.

2. §§1-102 through 1-104.

The remaining provisions of Title 1 are largely unchanged except for stylistic revision. For example, use of the verbs "shall" and "shall be" are proposed for deletion throughout this title as well as the entire article and the present tense is used, except in those cases where the statute uses "shall" or "shall be" to impose a specific duty or requirement on a particular person. This revision conforms to the guidelines established by the Code Commission.

Section 1-104, which provides that the provisions of the article may be varied by agreement except in certain instances, is revised to indicate that this provision is subject to §1-103. Section 1-103 provides that any reference in the article to a person automatically binds his successors in interest, unless the statute expressly provides otherwise.

Lastly, the severability provision in present Art. 21 is proposed for repeal because it is no longer necessary in light of Art. 1, §23 which provides a uniform severability provision applicable to the entire Code.

B. Title 2 - Rules of Construction.

Title 2 provides the rules of construction that are applicable to the entire article. In present Art. 21 this title appears as Title 5 but appears in the revised article as Title 2 because

it is more appropriate from an organizational point of view to have rules of construction follow the definitions.

Only a few stylistic and other revisions are made in this title. For example, present Art. 21 refers to "deed conveying property." The Commission has substituted "deed" since the definition of "deed" in §1-101(c) provides that as used in this article a deed means a deed "pertaining to land or property." Likewise, the phrase "his heirs, devisees, personal representatives, assignees" used throughout this title and this article is proposed for deletion because the provisions of §1-103 relating to "successors in interest" render the phrase unnecessary.

Section 2-104 provides that covenants in a deed have the same effect as if the covenant was by the covenantor and made with the grantee in the deed. The Commission added new language to clarify that this provision is intended to create a rebuttable presumption.

In §2-109, the Commission intended to add new language to provide that a covenant of quiet enjoyment in a deed guarantees the grantee against only the lawful claims and demands of a person other than the grantor. The word "lawful," however, is omitted from the bill and should be added by amendment. This addition is necessary because this section is intended to provide that the covenant of quiet enjoyment would guarantee the grantee against all claims and demands by the grantor, whether lawful or unlawful, but only against the lawful claims and demands of any other person.

Section 2-113 which provides the meaning of the phrase "die without issue" is new language derived from §4-410 of the Estates and Trusts Article and modified to relate to deeds. The language of the current law, §5-113, is substantially identical to the new

language and, therefore, the effect of the law is unchanged.

In §2-116(a), the Commission added new language suggested by the Code Revision Committee to resolve a conflict presently existing between this provision and §14-112. These sections concern the powers of trustees in those cases where their powers are delineated and where the powers are nominal. Art. 21, §5-116, from which §2-116 is derived, is the modern day successor to the Statute of Uses and provides that when property is conveyed under a passive trust, it is deemed a direct conveyance to the beneficiary. Section 14-112, on the other hand, provides that if a trustee or fiduciary takes title to property without limitation expressed in the grant to him, he may convey the property except to the extent limited by the grant to him or in a previously recorded instrument. These two sections create conflicting priorities. For example, what if a beneficiary under a passive trust attempts to convey title to his property and at the same time the trustee is executing a deed which is accepted on the basis of §14-112? Are title examiners able to rely on §14-112 or must they still require presentation of some trust instrument to determine if it created a passive trust?

On the recommendation of the Code Revision Committee of the State Bar Association, the Commission added new language to §14-112 to indicate that a trustee who takes title may grant the property if a beneficiary is not designated in the instrument by which the trustee takes title or in another previously recorded instrument signed by the grantor, or if an instrument signed by the trustee designating a beneficiary is not recorded prior to the disposition by the trustee. Section 5-116(a) is revised so that it is applicable to personal as well as real property.

C. Title 3 - Recordation.

Title 3 contains all provisions generally relating to the recording of deeds. It is divided into the following subtitles:

Subtitle 1 - General Rules and Exceptions.

Subtitle 2 - Priorities Based on Recording.

Subtitle 3 - Record Books and Indexes.

Subtitle 4 - Maryland Revised Uniform Federal Tax Lien Registration Act.

Subtitle 5 - Recording and Other Costs.

In contrast to the preceeding two titles, Title 3 required more extensive stylistic and organizational revision.

1. Section 3-104(a) provides that no deed effecting a change of ownership may be recorded until the property granted is transferred on the county tax assessment books. It further provides that the "clerk to the county commissioners or the director of the department of assessments for Baltimore City" (sic) shall indicate the transfer in the deed. Since this reference is incomplete to the extent that it does not provide for charter counties and is obsolete because some clerks of county commissioners do not perform this function, this subsection is revised to refer to "the person recording the transfer." In subsection (b), the present reference to "real estate" is proposed for deletion and "land" is substituted because there is no definition of "real estate" in Subtitle 1. During the 1972 revision, the revisors decided to use the terms "property" and "land," which have identical definitions, throughout the article. To maintain consistency throughout the revised bill, the Commission substitutes either "land" or "property" wherever "real estate" appears in Art. 21.

Subsection (b) is revised to require if all the land the grantor owns is being transferred, personal property taxes must be paid by the grantor in the county where the land is located prior to transfer on the assessment books. Although the present law provides that all personal property taxes must be paid, the Commission restricted this requirement to the particular county to avoid placing an inordinate burden on the grantor and the county officials recording the transfer. Finally, the present reference in subsection (b) to the "treasurer, tax collector, and director of finance" are proposed for deletion and "tax collecting agency" is added to accommodate future changes in laws designating the particular local tax collector for the jurisdiction.

In §3-104(f)(6), which relates to easements for public utilities or government agencies, new language is added to indicate that this subsection relates to agencies of the State which are not principle departments. The original intent of the statute probably was that this section should apply to a grant to any administrative unit of the State, not merely principle departments.

2. Section 3-105(d) provides that a debt secured by a deed of trust may be released when a bond or note is marked "paid" or "cancelled" by the holder and it is recorded by the court clerk. This section is revised to permit an agent of the holder as well as the holder to release debts. This addition reflects the present practice of banks when acting as collecting agents for principals of marking each note as "paid" or "cancelled."

3. Present §3-108 of Art. 21, which provides the required contents of plats and the procedures for recording them, is disorganized, inconsistent, and archaic in many respects. For this

reason, the Commission felt that a thorough revision and modernization of this section was necessary because surveying procedures have changed considerably since the section was originally enacted in 1945. Consequently, in revising this section the Commission enlisted the expertise of the Code Revision Committee and Delegate S. Ruffin Maddox, Jr., a surveyor and civil engineer.

Section 3-108(a) is new language added to indicate that the provisions of this section are in addition to other provisions of the Code relating to the recordation of subdivision plats. Art. 66B, for example, provides that a plat of a subdivision subject to the provisions of the subtitle must be approved before it is recorded. This article also requires the plat to be recorded, unlike §3-108 where recording is discretionary.

The present introductory language which refers to the subdivision of land for "town or villa sites" is proposed for deletion on the grounds that it is archaic. The revision of subsection (b) is intended to refer to the present practice and relates to subdivisions for "commercial, industrial, or residential" uses.

With regard to the description of plats in subsection (c), the present discretionary nature of paragraph (2), indicated by use of the word "may", is omitted because the law has been interpreted to require plats to be drawn on linen sheets. The present reference to blueprints is proposed for deletion because blueprints no longer are used. The word "and" is added between "accurately" and "to scale" to clarify the intent of this section. If the statute provided that the plats "shall be drawn to scale," then it is implicit that they must be drawn accurately to scale. Lastly, new language is added to provide that the plat shall be legible. In subsection (c)(5), the present provision requiring a meridian to be drawn

through one of the corners of the outline is proposed for deletion and this paragraph is revised to comply with the present practice of using a north arrow which also would permit the use of a meridian line. In subsection (c)(6), the present reference to "distances and coordinates" is proposed for deletion because these are not calculated from the meridian. In subsection (c)(8), the present language is clarified to indicate that the marker must be three feet into the ground and may be more than three feet into the ground in accordance with other practices. Subsection (c)(10) is revised to provide that the owner signs "to the best of his knowledge" and also requires the surveyor to sign the certificate since he prepared it.

Subsection (f)(2), which provides for resubdividing in a manner different from the recorded plat in Worcester County, is proposed for deletion in light of subsection (c).

4. Section 3-109, which provides for the indexing and recording of plats showing rights-of-way for State highways, is revised so that the present reference to the "State Roads Commission" is proposed for repeal because this agency no longer exists due to departmental reorganization. The successor agency, the State Highway Administration, is substituted.

5. As revised, §3-301 refers the Code user to §9-402 of the Commercial Law Article which the Commission had planned to introduce during the 1974 Session. After the printing of Senate Bill 200 the Commission decided not to introduce the Commercial Law Article. Therefore, an amendment should be added to the bill to provide for a notation in the "financing records" that the instrument has been recorded in the "land records."

6. Subtitle 4 is the Maryland Revised Uniform Federal Tax Lien Registration Act. As the revisor's note indicates, no changes other than one or two stylistic ones are made since it is the policy of the Commission that Uniform Laws should be changed as little as possible.

7. In §3-301(a), the last sentence, which provides for maintenance of a separate index for mechanics' liens,is proposed for deletion because it duplicates the provisions of §9-105.

8. Subtitle 5,which provides for recording and other costs, does not appear in present Art. 21 but, rather, is derived from Art. 36, §12(c). No changes, other than stylistic changes, are made in the present language.

Section 3-503 provides that county officials may not be charged any fee provided by the State without the county's consent. This section is derived from Article 36, §12(d)(2) and is included here because a recent Court of Appeals decision, Mayor and City Council of Baltimore v. Superior Court of Baltimore City (Nov. 12, 1973) construed this section as exempting county officials from any fee charged pursuant to Art. 36, §12 and not merely from those in subsection (d). Prior to this decision, the applicability of §12(d)(2) was unclear and had been interpreted to apply only to subsection (d). In addition, it should be noted that this section is applicable to Baltimore City since Baltimore City is included within the definition of "county" in §1-101(b).

D. Title 4 - Requisites of Valid Instruments.

Title 4 is divided into the following subtitles:

Subtitle 1 - General Rules.

Subtitle 2 - Forms.

No changes other than stylistic ones are made in subtitle 1. In §4-106(e), however, the cross reference to the Commercial Law Article should be changed by amendment since this article will not be revised during the 1974 Session.

E. Title 5 - Statute of Frauds.

In Art. 21 this title presently appears as Title 2 but was placed here since it seems more appropriate for the rules of construction to appear as Title 2.

Likewise, in this title no changes except stylistic ones are made. However, it should be pointed out that §5-104 is missing some crucial language and the following phrase should be inserted after "land":

> "unless the contract or agreement in which the action is brought, or a memorandum or note of it, is in writing and signed by the party to be charged or some other person lawfully authorized by him."

As the revisor's note to §5-104 indicates, §2-104(b), (c) and (e) initially were intended to be transferred to the Commercial Law Article since the subject matter of these provisions is more germane to commercial and business transactions than to real property. The

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1. Art. 21, §2-104 provides:

"No action shall be brought:
...
(b) To charge a defendant upon any special promise to answer for the debt, default or miscarriage of another person; or
(c) To charge any person upon any agreement made upon consideration of marriage; or
...
(e) Upon any agreement that is not to be performed within the space of one year from the making thereof;
unless the contract or agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some other person by him lawfully authorized."

Commission now proposes that these three subsections be transferred to Art. 39C where they originally appeared prior to the 1972 revision pending appropriate reallocation of them by the Commission during the next year.

F. Title 6 - Rights of Entry and Possibilities of Reverter.

As in Titles 4 and 5, the revision of Title 6 makes very few changes in the present law other than stylistic and organizational ones. Some of the present language of this title is rather confusing and the Commission, therefore, made substantial stylistic revisions in several sections, such as §§6-101 and 6-102. Section §6-102(e)(1) presently contains an obsolete provision requiring that initial notices of possibilities of reverter and rights of entry created before July 1, 1899 be recorded "within three years after July 1, 1969." The Commission proposes that this paragraph be repealed and that a new paragraph (1) be added to codify the law relating to the possibilities of reverter and rights of entry created before July 1, 1899, without the present obsolete provisions.

G. Title 7 - Mortgages, Deeds of Trust, and Vendor's Liens.

Title 7 is divided into two subtitles as follows:

Subtitle 1 - Mortgages and Deeds of Trust.

Subtitle 2 - Vendor's Liens.

1. Section 7-105(d)(2), which presently permits foreclosure sales to be made subject to "existing" tenancies if the sales are authorized by the mortgage or deed of trust and are disclosed in the required advertisement, is revised to clarify the ambiguity surrounding the meaning of "existing" tenancies. The Commission added language to this provision to indicate that foreclosure sales

may be made subject to any tenancy entered into subsequent to the recording date of the mortgage or deed of trust.

2. Section 7-106(b) requires a person who has undertaken responsibility for the disbursement of funds in connection with the grant of title to the property to "furnish" the vendor and purchaser with a copy of the recorded release. Since the meaning of the word "furnish" is unclear, the Commission substituted the phrase "mail or deliver" in this provision and throughout the article wherever the word "furnish" appears.

In addition, the Commission proposes that the General Assembly repeal subsection (b)(7), which provides that §7-106(b) does not apply to loans secured by a mortgage or deed of trust where the interest rate charged is one that is lawful under Art. 49, §7.[2] Subsection (b) provides a number of other safeguards which should be applicable to business and commercial organizations subject to Art. 49, §7 because they are often as unsophisticated as individual consumers in their affairs and deserve protection equal to that afforded consumers in dealing with complex business transactions.

In subsection (c), the present provisions relating to the procedural aspects of filing a petition in equity to obtain a release are omitted since they duplicate other general provisions of the

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2. Art. 49, §7 provides:

"Notwithstanding the other provisions of this article, it shall be lawful to charge, contract for, and receive any rate or amount of interest on any loan to any business or commercial organization or to a person or persons owning or desiring to acquire a business as a sole proprietor or joint venture, if the loan is transacted solely for the purpose of carrying on or acquiring a business or commercial investment, provided that the principal of said loan is in excess of $5,000."

Code and the Maryland Rules.

Finally, language is added in subsection (c)(2) to indicate that the clerk shall record the release in accordance with those provisions of §3-105(b) and (c) which provide for this procedure.

3. Section 7-107 requires the mortgagee or trustee who has assumed responsibility for paying real estate taxes under an expense account arrangement to pay them within a certain period of time. This provision duplicates the provisions of Art. 81, §48(f) to a certain extent.[3] Art. 81, §48(f), however, is of general application and is not limited to payment of real estate taxes. This section refers to ordinary taxes, whatever they may be, e.g., those payable for income tax, State and Federal, inventory tax and any other kind of tax imaginable. It is the conclusion of the Commission that this general wording places attorneys and trustees in a difficult and awkward situation which was unintended by the General Assembly.

During the 1973 Legislative Session, the General Assembly enacted S.B. 913 which restricts the applicability of the section to

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3. Art. 81, §48(f) provides:

"Any person receiving funds on behalf of a taxpayer for the purpose of paying the taxpayer's ordinary taxes, whether such funds be called an escrow account, expense account, or otherwise described, shall pay such taxes on their due date in each taxable year if the funds received as of that date are sufficient to pay such taxes less any discount allowed therefrom provided that taxpayer receiving his tax bill directly from a political subdivision is timely in delivering the tax bill to the persons receiving funds on his behalf for the purpose of paying the taxpayer's ordinary taxes. If the funds so held on the due date in any year are not sufficient to pay the net taxes due on that day, the person holding the funds shall pay the taxes not later than thirty days after such time as the funds may become sufficient to pay the amount then due. Any person failing to make timely payment as required hereunder shall be liable to pay a penalty of one per centum of the gross amount of the unpaid taxes due for each month and fraction thereof until paid."

bills received by taxpayers "directly from a political subdivision." If the taxpayer received a bill directly from a former owner of property he would not have received it directly from a political subdivision and, consequently, §48(f) would not protect him. This strict limitation appears to defeat the purpose of the amendment. Finally, Art. 81, §48(f), from its inception in 1961, has provided for a penalty of 1% of the gross amount of the unpaid taxes. This section, however, fails to provide to whom the penalty is to be paid. In addition, the present reference to "mortgagee" and "trustee" is proposed for deletion and "lender" is substituted in view of the fact that a trustee in such an arrangement generally does not have any responsibility for the handling of funds or payment of taxes. It is the lender who handles the funds rather than the trustee.

4. Present §7-108 is proposed for repeal and H.B. 424 as amended by both houses during the 1973 Legislative Session of the General Assembly is substituted therefor. Since this bill was passed by both houses but vetoed by the Governor only because it had a defective title, the Commission decided that it was appropriate to include it in the revised bill.

5. In §7-201 new language is added to provide that the time set for payment shall be specified and recited in the deed. This provision is derived from former Art. 66, §31 which was inadvertently omitted in the 1972 revision of Art. 21.

H. Title 8 - Landlord and Tenant.

The revision of Title 8 reorganizes the sequence of many of the provisions of present Art. 21 in order to segregate the general rules relating to landlord and tenant from those provisions strictly applicable to residential leases. In the revised bill provisions affecting residential leases are in Subtitle 2 - Residential Leases. Title 8 is divided into the following subtitles:

Subtitle 1 - General Rules.

Subtitle 2 - Residential Leases.

Subtitle 3 - Distress for Rent.

Subtitle 4 - Landlord's Remedies other than Distraint

1. Very few changes other than stylistic and organizational ones are made in Subtitle 1 which now contains the general provisions applicable to landlord and tenant relationships. The revision of §8-208, which presently provides for the termination of a tenancy if the premises become untenantable because of a fire or "other" unadvoidable accident, deletes "other." This is proposed because the legislature probably intended this section to apply to any fire not just unadvoidable ones.

2. Section 8-201, which limits the applicability of this subtitle to residential leases, is derived from language presently appearing in §8-102(a). The Commission proposed that this subsection be set forth here because it seems to define most accurately "residential lease" as currently used in the subtitle.

3. Section 8-202, which provides the time of redemption for rents for leases for more than 15 years, is revised so that it does not apply to leases executed before 1900 because these provisions are obsolete.

4. All references to "written or oral" leases are proposed for deletion in this section and throughout the title in light of the definition of "lease" in §1-101(h).

5. In Subtitle 3 (Distress for Rent), §8-311 provides that any person not a tenant whose goods are levied on under distress may file a petition for an order to exclude his goods from the levy. At the present time there is no provision requiring that the tenant be informed of the removal of the goods of a third person. The revised article retains this provision because a change would involve substantive law. The Commission, therefore, recommends that the General Assembly consider remedial legislation.

6. As the comments prefacing Subtitle 4 of Title 8 In Art. 21 indicate most, if not all, the provisions relating to landlord's remedies other than distraint are "archaic, confusing, disorganized, and inconsistent." The comments also indicate that the 1972 revision simply recodified the present statutes with only stylistic changes due to the existence of a separate gubernatorial commission studying the subject.

As of this date, little if any remedial legislation has been enacted. Although the Commission does not favor perpetuating the present state of this law, it felt that it could not effectively revise the subtitle without substantive change involving policy questions. Therefore, the Commission recommends that the General Assembly enact legislation eliminating the ambiguities and inequities that currently afflict Subtitle 4. Some of the more salient problems in Subtitle 4 are set forth in the revisor's note following §8-402.

I. Title 9 - Statutory Liens on Real Property.

Title 9 consists of the following subtitles:

Subtitle 1 - Mechanics' Liens.

Subtitle 2 - Statutory Real Property Lien by the State.

1. Section 9-101(b), which describes the types of property and debts which are exempt from a mechanics' lien, is revised so that it refers to a "natural" person. This is intended to indicate that the standard definition of "person" provided in §1-101(j) is inapplicable in this section.

2. Section 9-105(c) which describes the items that must be stated in a valid claim for a mechanics' lien, omits the existing requirement that a claim also must include "the number and size of the stories" of the building. The change is recommended because this requirement is contrary to existing practice and is very difficult to satisfactorily determine.

3. The Code Revision Committee of the State Bar Association recommends that the General Assembly consider amending §9-107(b) so that a mechanics' lien attaches only after the completion of all work necessary to qualify for a building permit. The Committee points out that the existence of this provision makes it quite difficult to obtain financing for construction because lending institutions are reluctant to provide funding in the face of possible attachment of a mechanics' lien.

4. Section 9-112 provides for protection of materialmen and subcontractors on State projects through the use of performance bonds and other forms of security. Subsection (a) contains two new definitions intended to clarify terms used in the section, "contractor" and "public body."

In addition, language is proposed in subsections (b) and (i) to provide that bonds shall be filed in either the "main office of the State contracting agency" or the "main office of the concerned public body" in order to reflect the current practice.

5. In §9-113, subsection (a) which provides a $3 charge for recording each page of a mechanics' lien is derived from Art. 36, §12(c)(9). Subsection (b), which exempts a county from the fees unless it first gives its consent, is derived from Art. 36, §13(d)(2), which is described in C.8. of the report.

6. Section 9-201, is a revision of existing Art. 9, §49 which is perhaps one of the most obscure, seldom used, and antiquated parts of the Code. The section provides that generally when the State institutes a suit or files a lien against real property, the property is subject to the lawful execution of the State's lien regardless of who is in actual possession of the property. It is the strong recommendation of the Commission that the General Assembly consider repealing this section as unnecessary, unreasonable, and improperly burdensome on real property transactions. The section allows the State an advantage as a creditor superior to the status enjoyed by other creditors. The lien is broad enough to encumber property of the debtor wherever located and it creates a heavy burden on creditors and others charging them with notice of an encumbrance that they can find only by searching the records of every court in the State. Title companies especially would be exceptionally burdened in this connection. The Commission decided not to propose repeal of this section only because this action would involve a substantive change and, thus, be in violation of the mandated scope of the Commission's authority.

The references to "personal property" which currently appear

in Art. 9, §49 are proposed for deletion from this section of the Code as they are included in the revision of Art. 9, §49 which appears elsewhere in this bill.

J. Title 10 - Sales of Property.

Title 10 is divided into the following subtitles:

Subtitle 1 - Land Installment Contracts.

Subtitle 2 - Express and Implied Warranties.

Subtitle 3 - Deposits on New Homes.

Subtitle 4 - Recorded Land Contracts.

1. Section 10-102(f) gives a person who purchases property subject to a land installment contract an unconditional right to cancel the contract and receive an immediate refund of "all payments and deposits made on account of or in contemplation of the contract." This subsection does not indicate whether the purchaser has a perpetual right to cancel and receive a refund or whether this right expires at some time, e.g., when the vendor records the contract. The Commission recommends that the General Assembly consider enacting separate legislation to remedy this ambiguity.

2. Section 10-103(d) fails to provide the purchaser with a remedy if the vendor violates the section and holds a mortgage on property sold under a land installment contract in an amount greater than the balance due under the contract or requires mortgage payments in excess of the periodic payments under the contract. If the vendor holds a mortgage on any property sold under a land installment contract in a greater amount, is the mortgage unenforceable? In addition, subsection (d) fails to specify whether this section applies only to the existing mortgage or to a junior mortgage. The Commission

recommends that the General Assembly consider enacting legislation to remedy this problem.

3. Section 10-201(d) defining "realty" does not include irredeemable leasehold estates although it does include both freehold estates and redeemable leasehold estates. Since this subtitle is designed to provide for certain implied and express warranties by a vendor creating improvements on property, the General Assembly may wish to consider appropriate corrective legislation.

4. Section 10-302(c) provides a schedule of penalties applicable to a corporate surety bond that is a blanket bond. A vendor or builder who demands money prior to the completion of a new single family residential unit is required by §10-301 to obtain a corporate surety bond if he does not place the money in a segregated escrow account. It should be noted that the existing schedule in subsection (c) has an absurd effect. For instance, the penalty for a $499,000 deposit is $200,000, while the penalty for a $500,001 deposit is $500,000. This inequitable system might be replaced by penalties based on a percentage of the bond. The General Assembly may wish to consider enacting legislation to remedy this inequity.

K. Title 11 - Horizontal Property Act.

The Commission has made no stylistic or other changes in Title 11 since the Code Revision Committee of the Section of Real Property, Planning and Zoning Law of the Maryland State Bar Association is completely revising this title and the resulting bill will be introduced during the 1974 Legislative Session of the General Assembly.

L. Title 12 - Eminent Domain.

This title is divided into two subtitles as follows:

Subtitle 1 - General Rules.

Subtitle 2 - Relocation and Assistance.

The Commission made few changes in this title other than strictly stylistic and organizational ones.

1. One stylistic change was made in several sections throughout the title and should be noted. The existing article refers frequently to "real property." As was pointed out earlier, "real property" is not defined in this article while "land" and "property" are defined as "real property or any interest therein or appurtenant thereto"; see §1-101(f) and (k). Use of "property," however, throughout this subtitle would cause confusion since this subtitle in contrast to others contains several provisions relating to "personal property." Consequently, "land" is substituted wherever "real property," "real estate," or "realty" appears in a section referring to "personal property."

2. Section 12-104(d), which provides for the measure of damages for the taking of a church, is revised to incorporate the construction given this subsection by the Court of Appeals in City of Baltimore v. Concord Baptist Church, 257 Md. 132 (1970). A copy of this opinion appears in the Appendix.

3. Section 12-111(a) authorizes persons acting on behalf of the State or public instrumentalities having the power of eminent domain to enter private property to obtain information relating to the acquisition. The Commission recommends that the General Assembly consider enacting legislation to provide that some sort of prior notice be given before entry occurs.

4. In §12-206(b)(3) the provision authorizing the "head" of the public or private agency to exempt by rule or regulation those situations where the provision does not apply is revised so that the reference to "head" is omitted. This deletion is proposed to maintain consistency with an analogous amendment to §12-205 made by Ch. 696, Acts of 1973.

M. Title 13 - Land Patents.

1. Art. 21, §13-101 is proposed for repeal on the grounds that it is unnecessary to include this provision in the Code. It merely provides a statement of the reasons underlying the enactment of the section, the sort of legislative history which is more appropriately retained in the Session Laws.

2. The definition of "Commissioner" in Art. 21, §13-102(2) is proposed for deletion because this title is confusing and meaningless in light of the fact that the Archivist of the Hall of Records administers the act. Accordingly, a new definition of "Archivist" is provided in §13-101(c) and all references to the "Commissioner" throughout the title are proposed for deletion and "Archivist" substituted. This revision will alleviate the confusion that currently accompanies the use of dual titles by the Archivist.

The Commission proposes that the existing requirement in present §13-102(a) that the Archivist use the seal formerly used by the Commissioner of the Land Office be deleted. This is an unnecessarily restrictive practice.

3. In §13-105(b)(3) new language is proposed to specify that

the assessment records must be "current." New language also is added to subsection (b)(5) to indicate that the requirements for possessing land are similar to those for adverse possession.

4. Section 13-107 which provides for execution of the warrant and rules for conducting a survey or resurvey, has been substantially revised both in terms of organization and contents. The reorganization of the material is discussed fully in the revisor's note.

In subsection (c), a new paragraph (5) is added to indicate that the certificate also must contain a plat as described in new subsection (e). New subsection (e) which describes the form and contents to be included in the plat has been substantively revised so that it closely conforms to §3-108, which provides for the recording of subdivision plats. This parallel revision was undertaken because §13-107(e) originally was intended to conform to §3-108.

5. Section 13-108(a) provides that the surveyor shall give proof of possession of the land during the preceding 20 years. New language is added here to provide that these requirements are similar to those for adverse possession.

6. Section 13-109 provides for the examination of certificates and plats filed by the surveyors and for their return if they are unsatisfactory. The section is revised to provide that an incorrect or incomplete certificate and plat shall be "promptly" returned.

7. Section 13-111 provides the Archivist with a method for determining whether to issue a patent.

In §13-111(b), new language is added to provide that the requirements for possessing land applied for in a patent action

are similar to those for adverse possession.

8. Section 13-113 provides that adverse possession of the land by another will bar a claim for a land patent. Prior to the 1973 Extraordinary Session, this section was Art. 57, §10 but was recodified and renumbered by the Courts Bill to appear as Art. 21, §13-111.1 of the Code.

In this section references to "common or special warrant, or warrant of resurvey, escheat or proclamation warrant" are omitted in light of §13-105(a) which abolishes these forms of warrants.

9. Section 13-120 contains a schedule of fees that may be charged for different services that may be rendered during the patenting process. The section presently appears as Art. 36, §16.

Existing subsection (d), (e), (f), and (h) are proposed for deletion on the recommendation of the Archivist of the Hall of Records on the grounds that the fees required in subsections (d), (e), and (f) are insignificant in amount in comparison to the effort and costs involved in collecting them. In fact the fines are not currently collected despite the mandate of the existing statute. The fee in subsection (h) is proposed for deletion because persons who abandon a proceeding usually refuse to pay this fee and it is too small an amount to justify institution of a collection proceeding by the State.

10. It is the recommendation of the Commission that the General Assembly give consideration into undertaking an extensive substantive rewriting of the State's land patent procedures in the near future.

It is the finding of the Commission that while a land patent procedure is necessary in order to provide an orderly process for claiming ownership to the often sizeable tracts of vacant land found

in Western Maryland and for placing this property on the tax rolls, the existing law does not satisfy these needs. The Commission believes that the existing law is cumbersome in its operation, confusing in the way that it is set forth in the Code, and ineffective in its administration.

Accordingly, the Commission proposes that the General Assembly authorize a joint review of this area by members of the Legislative Council and the State Bar Association.

N. Title 14 - Miscellaneous Rules.

1. Section 14-102 describes what constitutes waste, the right to maintain an action for waste, and a penalty for committing waste. The clause in present subsection (b) providing that the fine in this section remains to the credit of the cause in which the injunction is issued is proposed for deletion. If the fine is levied by the District Court, the fine goes to the District Court System; if levied by a circuit court, it goes to the general funds of the State.

2. Section 14-103 provides generally for the procedural steps that should be undertaken after a court ordered sale. In subsection (a), language exempting foreclosure sales under Subtitle W of the Maryland Rules is added so that this subsection no longer conflicts with the "relation back" principle in §7-105.

3. Revised §14-114 provides that if one who is evicted by a writ of possession reenters the property, he is guilty of a misdemeanor. The section is new language derived from Art. 75, §42 of the Code and it is proposed for addition here for organizational purposes.

O. Title 15 - Effective Date and Applicability.

Title 15, which provides for the effective date of the Article, appears in the revised bill with very few changes. Two special effective dates which presently appear in §8-213 (Security Deposit) are included in §15-102 for organizational purposes. Section 15-101, however, should be amended to refer to the July 1, 1974 effective date of the revised bill.

V. SUMMARY OF MATTERS FOR SPECIAL CONSIDERATION BY THE GENERAL ASSEMBLY.

In this report, the Commission has noted several provisions of the present law that should be brought to the attention of the Joint Committee as deserving special consideration. While drafting the article the Commission decided against revising these provisions because revision necessarily involved basic policy considerations.

A brief summary of these provisions follows:

1. Section 3-107 requires the clerk to leave a blank space at the foot of the deed when recording it so that assignments and releases may be entered. The Commission suggests that this section be amended to permit such recording on microfilm. At the present time it is impossible to comply with this provision in Anne Arundel, Montgomery, and Prince George's Counties where records are only on microfilm.

2. Section 8-311 provides that any person not a tenant whose goods are levied on under distress may file a petition for an order to exclude his goods from the levy. At the present time there is no provision requiring that the tenant be informed of the removal of the goods of third persons. The Commission suggests that the

General Assembly may wish to consider legislation in this connection.

3. In §8-203, as amended §8-202, the General Assembly might consider enacting legislation to remedy the burden that this provision places on the tenant by denying him a opportunity to buy under a lease option agreement that does not contain the language "This is not a contract to buy."

4. As the comments prefacing Subtitle 4 of Title 8 in Art. 21 indicate, most if not all the provisions relating to landlord's remedies other than distraint are "archaic, confusing, disorganized, and inconsistent." The Commission recommends that the General Assembly enact legislation eliminating the ambiguities and inequities that currently afflict Subtitle 4. Some of the more salient problems in Subtitle 4 are set forth in the revisor's note following §8-402.

3. Section 9-201, a revision of present Art. 9, §49, gives the State a lien superior to any other lien when it initiates suit or files a lien against real property regardless of who is in actual possession of the property.

It is the strong recommendation of the Commission that the General Assembly consider repealing this section as unnecessary, unreasonable, and improperly burdensome on real property transactions. The section allows the State an advantage as a creditor superior to the status enjoyed by other creditors. The lien is broad enough to encumber property of the debtor wherever located and it creates a heavy burden on creditors and others charging them with notice of an encumbrance that they can find only by searching the records of every court in the State. Title companies especially would be exceptionally burdened in this connection. The Commission decided

not to propose repeal of this section only because this action would involve a substantive change and,thus,be in violation of the mandated scope of the Commission's authority.

4. Section 10-102(f) gives a person who purchases property subject to a land installment contract an unconditional right to cancel the contract and receive an immediate refund of "all payments and deposits made on account of or in comtemplation of the contract." This subsection does not indicate whether the purchaser has a perpetual right to cancel and receive a refund or whether this right expires at some time, e.g., when the vendor records the contract. The Commission recommends that the General Assembly consider enacting separate legislation to remedy this ambiguity.

5. Section 10-103(d) fails to provide the purchaser with a remedy if the vendor violates the section and holds a mortgage on property sold under a land installment contract in an amount greater than the balance due under the contract or requires mortgage payments in excess of the periodic payments under the contract.

6. Section 10-107(b) requires that the statement given by a vendor to a purchaser under a land installment contract indicate certain information, such as the total amount paid for insurance, taxes, and other periodic charges. This section fails to indicate from when the amount paid and credited dates. Is it intended to apply only to amounts paid and credited since the last statement? The Commission recommends that the General Assembly consider enacting legislation to rectify this ambiguity.

7. Section 10-201(d) defining "realty" does not include irredeemable leasehold estatse although it does include both freehold estates and redeemable leasehold estates. Since this

subtitle is designed to provide for certain implied and express warranties by a vendor creating improvements on property, the General Assembly may wish to consider appropriate corrective legislation.

8. Section 10-302(c) provides a schedule of penalties applicable to a corporate surety bond that is a blanket bond. This schedule has an absurd effect since the penalty for a bond in the amount of $499,000 is $200,000, while a bond in the amount of $500,001 must incur a penalty of $500,000. This inequitable system might be replaced by penalties based on a percentage of the bond.

9. The Commission recommends that the General Assembly consider legislation in relation to Title 12 to require that prior notice be given to an owner of private property when persons acting on behalf of the State or a public instrumentality enter on the property to obtain information relating to eminent domain.

10. It is the recommendation of the Commission that the General Assembly give consideration to undertaking an extensive substantive rewriting of the State's land patent procedures in the near future.

It is the finding of the Commission that while a land patent procedure is necessary in order to provide an orderly process for claiming ownership to the often sizeable tracts of vacant land found in Western Maryland and for placing this property on the tax rolls, the existing law does not satisfy these needs. The Commission believes that the existing law is cumbersome in its operation, confusing in the way that it is set forth in the Code, and ineffective in its administration.

Accordingly, the Commission proposes that the General Assembly authorize a joint review of this area by members of the Legislative Council and the State Bar Association.

The Commission does not suggest that all of these matters need be resolved during the 1974 Legislative Session. Some of them may require further study, and many could appropriately be handled by the Legislative Council. This list is intended primarily as an aid in determining what matters should be given further consideration.

Respectfully submitted,

William S. James
President of the Senate
Chairman

John Hanson Briscoe
Speaker of the House
Vice Chairman

MAYOR AND CITY COUNCIL OF BALTIMORE, ET AL. *v.* THE CONCORD BAPTIST CHURCH, INC., ET AL.

[No. 235, September Term, 1969.]

Decided March 3, 1970.

SINGLEY, J., delivered the opinion of the Court.

Aware of the unique difficulties inherent in the condemnation of church structures,[1] the General Assembly enacted § 9A 1 (b) of Chapter 804 of the Laws of 1945.[2] The provision survives, after a substantial modification made by Chapter 52 of the Laws of 1963 as Maryland Code (1957, 1967 Repl. Vol.) Art. 33 A § 5 (d) (the Act):

> "*Churches*—The damages to be awarded for the taking of a structure held in fee simple, or under a lease renewable forever, by or for the benefit of a religious body and regularly used by such religious body as a church or place of religious worship, shall be the reasonable cost as of the valuation date, of erecting a new structure of substantially the same size and of comparable character and quality of construction as the acquired structure at some other suitable and comparable location within the State of Maryland to be provided by such religious body. Such damages shall be in addition to the damages to be awarded for the land on which the condemned structure is located."

This case challenges the constitutionality of the Act.

In 1967, the Mayor and City Council of Baltimore (the City), faced with the necessity of acquiring two church properties for the construction of Interstate Route 70 N, instituted two condemnation proceedings in the Superior Court of Baltimore City: one against The Concord Baptist Church, Inc. (Concord) for the taking of its church

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1. See Baker and Altfeld, "Maryland's New Condemnation Code" 23 Md.L.Rev. 309, 319-320 (1963) and Maryland Legislative Council Report (1963) at 285.

2. "§ 1 * * * (b) Whenever State, county or city authorities, or their agents, shall for any public purpose or purposes have the right to acquire, or proceed by the power of eminent domain to acquire, property that is used as a church or place of worship, the Jury, in assessing damages for said church or place of worship so acquired or to be acquired, shall take into consideration, in addition to the fair value of the church or place of worship so condemned, the difference between the fair value of the church or place of worship condemned and the cost of erecting or constructing a new church or place of worship of substantially the same size, type, design and character of construction as the structure condemned at some other suitable or comparable location within the State of Maryland to be provided by the authorities of the structure condemned."

property at 901-907 West Franklin Street and another against The New Union Baptist Church, Inc. (Union) for the taking of its church at 413-415 North Schroeder Street.

Filed with the petitions of condemnation in each case was a stipulation in which the parties agreed upon the fair market value of the property being taken ($115,000 in Concord's case; $50,000, in Union's) and upon the amount of damages which they arrived at under the Act ($159,650 in Concord's case; $125,000, in Union's). The City deposited in court in each case the smaller of the two amounts, which the churches, under the stipulation, were permitted to withdraw. The stipulation further provided that the constitutionality of the Act would be submitted for judicial determination, and that should the Act be found invalid, the churches' recovery would be respectively limited to fair market value. In the event that the Act were upheld, the parties agreed that the City would pay to each church the difference between fair market value and the amount of damages which the parties arrived at under the Act.

The City then moved for the consolidation of the Concord and Union cases and for trial of the legal issue of constitutionality. This produced a bumper crop of pleadings upon which we need touch only lightly. The Convention of the Protestant Episcopal Church of the Diocese of Maryland; Lawrence Cardinal Shehan, Roman Catholic Archbishop of Baltimore, and the Maryland Synod of the Lutheran Church in America (the Intervenors) were permitted to intervene and were appellees before us. The case was tried in February 1968, and was held sub curia.

About a month after the hearing, the City instituted proceedings against Calvary Baptist Church (Calvary) for the condemnation of the church property at 556-560 West Biddle Street. The parties entered into a stipulation similar to that used in the Concord and Union cases, except that there was no agreement as to the amount of damages which would be arrived at should the Act be upheld. On the City's motion, the Calvary case was consolidated with the Concord and Union cases.

At this stage of the matter, the City, Charles L. Benton, individually and as the City's Director of Finance, and Hyman A. Pressman, individually and as the City's Comptroller brought a declaratory judgment proceeding against Concord, Union, Calvary and the Intervenors, in which they sought to have the Act declared unconstitutional, and later moved to have the declaratory judgment action consolidated with the condemnation cases. When an order staying the declaratory judgment case was signed, but never entered, Messrs. Benton and Pressman moved in their official capacities to intervene in the condemnation cases.

On 21 May 1969, the court below entered an order rescinding the stay of the declaratory judgment action; consolidating the declaratory proceeding with the condem-

nation cases; permitting Mr. Benton and Mr. Pressman to intervene in the condemnation cases; denying Concord's motion to dismiss which had averred that the City lacked the standing to raise the issue of constitutionality; and finally, holding the Act to be constitutional and the churches to be entitled to damages determined (in Calvary's case, to be determined) in accordance with the Act.

The City and Messrs. Benton and Pressman took an appeal, urging that the Act should have been declared unconstitutional because it imposes an unreasonable limitation on the State's right of eminent domain and violates the Fourteenth Amendment to the Constitution as well as Articles 19 and 23 of Maryland's Declaration of Rights and the Establishment Clause of the First Amendment.

Concord, Union and the Intervenors have cross appealed, assigning as error the lower court's failure to grant Concord's motion to dismiss for want of standing, in which those appellees had joined.

(i)

Standing

The lower court found that Concord, Union and Calvary, by entering into the stipulations, had, in effect, submitted the constitutional issue for decision. Entirely apart from this, however, Messrs. Benton and Pressman had sought declaratory relief and had later intervened in their individual and official capacities, as the City officials charged with the duty of acquiring property and paying for it. Theirs was the dilemma faced by public officials "either in refusing to act under a statute [they] believe to be unconstitutional, or in carrying it out and subsequently finding it to be unconstitutional," recognized in *Pressman v. State Tax Comm'n*, 204 Md. 78, 102 A. 2d 821 (1954) and in *Board of Education v. Allen*, 392 U. S. 236, 88 S. Ct. 1923, 20 L.Ed.2d 1060 (1968). See also, Borchard, *Declaratory Judgments* (2d Ed. 1941) at 771. Additionally, where the issues presented are of great public interest and concern, the interest necessary to sustain standing need only be slight. *Horace Mann League v. Board of Public Works*, 242 Md. 645, 653, 220 A. 2d 51, *cert. den.* 385 U. S. 97, 87 S. Ct. 317, 17 L.Ed.2d 195 (1966); *Baltimore Retail Liquor Package Stores Ass'n v. Board of License Comm'rs*, 171 Md. 426, 189 A. 209 (1937); see also *Hammond v. Lancaster*, 194 Md. 462, 71 A. 2d 474 (1950).

In holding that the individual appellants had standing, we are not overlooking the principles that the City, as a creature of the State, possesses no power which it may invoke against the State, even on constitutional grounds, *Duvall v. Lacy*, 195 Md. 138, 73 A. 2d 26 (1950); *Williams v. Mayor & C. C. of Baltimore*, 289 U. S. 36, 53

S. Ct. 431, 77 L. Ed. 1015 (1933); *United States v. Railroad Co.*, 84 U. S. (17 Wall.) 322, 21 L. Ed. 597 (1873), but compare *Gomillion v. Lightfoot*, 364 U. S. 339, 81 S. Ct. 125, 5 L.Ed.2d 110 (1960), and may have even less right to challenge the constitutionality of a statute under which it is proceeding. *Creative Country Day School v. Montgomery County Bd. of Appeals*, 242 Md. 552, 568, 219 A. 2d 789 (1966). Nor are we unmindful of the contention that a claim of unconstitutional discrimination may be asserted only by a person discriminated against. *Simpson v. Bd. of Appeals for Montgomery County*, 218 Md. 222, 146 A. 2d 37 (1958).

We conclude that there is no reason why Concord's motion to dismiss should have been granted.

(ii)

The Constitutional Issue

If the Act were to be interpreted as the City and the lower court construed it, *i.e.*, as requiring that the damages awarded be in an amount equivalent to the cost of reproduction or replacement of the improvements to which is to be added the value of the land, and paid only for church structures and not for other service properties, it may well be that grave constitutional issues would be raised both under the First Amendment (establishment of religion) and the Fourteenth Amendment (equal protection) to the United States Constitution and Articles 19 and 23 of the Maryland Declaration of Rights. It is conceivable that in most cases, an amount which exceeded fair market value could be paid to a church which would be under no duty to replace the facility condemned. While it may be argued that a condemning authority may select certain property owners and pay them an amount in excess of fair market value, 4 Nichols, *Eminent Domain* § 12.1[3] (Rev. 3d Ed. 1962) at 32-33, such a classification, to be constitutionally permissible, must be reasonable, *Tatelbaum v. Pantex Mfg. Corp.*, 204 Md. 360, 370, 104 A. 2d 813 (1954), or within the limits of equity and justice, *Joslin Mfg. Co. v. Providence*, 262 U. S. 668, 677, 43 S. Ct. 684, 67 L. Ed. 1167 (1923), assuming the classification to be constitutional. We do not, however, accept the City's argument that the Act is an abridgment of the sovereign powers of the State. Compare *Lock Haven Bridge Co. v. Clinton County*, 157 Pa. 379, 27 A. 726 (1893) with *Heritage Realty, Inc. v. Mayor & C.C. of Baltimore*, 252 Md. 1, 248 A. 2d 898 (1969).

We do not read the Act as the City does, however. It is scarcely necessary to restate the principles here involved. There is a strong presumption of constitutionality, *State's Attorney for Charles County v. Triplett*, 255 Md. 270, 257 A. 2d 748 (1969); *Gino's of Maryland, Inc. v. Mayor & C.C. of Baltimore*, 250 Md. 621, 244 A. 2d 218 (1968); *A & H Transp. Inc. v. Mayor & C.C. of*

Baltimore, 249 Md. 518, 240 A. 2d 601 (1968); *Deems v. Western Maryland Ry. Co.,* 247 Md. 95, 231 A. 2d 514 (1967); *Clark's Brooklyn Park, Inc. v. Hranicka,* 246 Md. 178, 227 A. 2d 726 (1967); *Pitts v. State Bd. of Examiners of Psychologists,* 222 Md. 224, 160 A. 2d 200, 81 A.L.R.2d 787 (1960) and if a statute may be construed in such a way as to avoid a conflict with the Constitution, we must adopt that construction. *Deems v. Western Maryland Ry. Co., supra; Stevens v. City of Salisbury,* 240 Md. 556, 214 A. 2d 775 (1965); *Hellmann v. Collier,* 217 Md. 93, 141 A. 2d 908 (1958). See also *Secretary of State v. Bryson,* 244 Md. 418, 224 A. 2d 277 (1966).

Maryland Constitution, Art. III § 40 prohibits the General Assembly from enacting any law authorizing the taking of private property without "just compensation." *Patterson v. Mayor & C.C. of Baltimore,* 127 Md. 233, 96 A. 458 (1915). The Fifth Amendment to the United States Constitution provides that private property shall not be taken for public use without "just compensation"; and the Fourteenth Amendment makes this binding on the states. *Chicago, Burlington & Quincy R.R. Co. v. Chicago,* 166 U. S. 226, 17 S. Ct. 581, 41 L. Ed. 979 (1897); *Scott v. Toledo,* 36 F. 385, 1 L.R.A. 688 (6th Cir. 1888). Just compensation has long been equated with fair market value. *United States v. Miller,* 317 U. S. 369, 63 S. Ct. 276, 87 L. Ed. 336 (1943); *State Roads Comm'n v. Warriner,* 211 Md. 480, 485, 128 A. 2d 248 (1957); *Pumphrey v. State Roads Comm'n,* 175 Md. 498, 506, 2 A. 2d 668 (1938); *Consolidated Gas Elec. Light & Power Co. v. Mayor & C.C. of Baltimore,* 130 Md. 20, 30, 99 A. 968 (1917).

The expert witnesses produced below by the appellants and the appellees agreed that there are three avenues by which fair market value may be approached: (i) Capitalization of income; (ii) cost of replacing improvements, adjusted for physical and functional depreciation to which is added the fair market value of the land, and (iii) sales of comparable property. Cf. *Bergeman v. State Roads Comm'n,* 218 Md. 137, 140, 146 A. 2d 48 (1958) and cases there cited; 1 Orgel, *Valuation Under Eminent Domain* §§ 157, 176, 177 (2d Ed. 1953); 5 Nichols, *supra,* §§ 19.1, 20.1 and 21.1. In a given case, one approach may be more appropriate than another, and the less appropriate may be used as a check against the approach relied upon.

All of the experts below conceded that capitalization of income is an inappropriate approach and all save the City's expert agreed that comparable sales are virtually unavailable for use in the appraisal of church property. Church property, like the property of a school or nonprofit hospital, is devoted to a service use, and income is either non-existent, or provides no reliable basis for appraisal. Moreover, service properties are seldom bought

and sold in the willing seller — willing buyer context, which Code Art. 33 A § 6 adopts in its definition of fair market value.

As the Supreme Court said in *United States v. Miller, supra*: "Where, for any reason, property has no market, resort must be had to other data to ascertain its value * * *." 317 U. S. at 374, 63 S. Ct. at 280, 87 L. Ed. at 343; 2 Orgel, *supra*, § 190 at 17 puts it this way:

> "The lack of other and better evidence than reproduction cost has been especially prominent with respect to so-called service properties, such as schools, club-houses, and churches, where value to the owner is the accepted measure of compensation. We have already discussed these cases * * * and have pointed out that, in the absence of objective tests of value to the owner, the award is generally based on market value of the land plus cost of reproduction (depreciated) of the structures. *Occasionally it is based on the cost to the owner of replacing his entire property, land and structures, with an equally acceptable substitute—a measure rejected when market value is the assumed test of compensation.*" (Emphasis supplied).

If we read the Act, mindful of the fact that Code Art. 33 A restated and codified existing case law, *State Roads Comm'n v. Adams*, 238 Md. 371, 377, 209 A. 2d 247 (1965); *Duvall v. Potomac Elec. Power Co.*, 234 Md. 42, 197 A. 2d 893 (1964), which had been oriented to fair market value for many years, *State Roads Comm'n v. Warriner*, 211 Md. 480, 128 A. 2d 248 (1957), we cannot accept the interpretation given the Act by the City and the lower court, that it fixed damages as "replacement cost—new, plus land."

On the contrary, we think that a proper interpretation of the Act is that in the condemnation of church property, fair market value of improvements shall be arrived at by using the reproduction cost approach, taking into account the size, character and condition of the building being condemned, but without giving consideration to comparable sales except as they may affect land value.[3] Our conclusion is consistent with the Act's legislative history. As originally enacted Chapter 804 of the Laws of 1945, which appears in footnote 2, *supra*, directed the jury to take into account the difference between fair value and cost of reconstruction. This might well have called for "replacement cost — new, plus land" as the measure of damages.

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3. In *First National Realty Corp. v. State Roads Comm'n*, 255 Md. 605, 612, 258 A. 2d 419 (1969), we had occasion to point out that it was not until 1895 that comparable sales were admissible as evidence of value in a condemnation proceeding.

To us, the language of the present Act "the damages to be awarded * * * shall be the reasonable cost as of the valuation date, of erecting *a new structure of substantially the same size and of comparable character and quality of construction* * * * (emphasis supplied), means the cost of reproducing or replacing the improvements, adjusted for physical and functional depreciation, to which shall be added the fair market value of the land. We must conclude that the legislative intent, as revealed by the Act, was to give to church property no benefit greater than that which would be accorded the owner of any other service property, despite the omission of other kinds of service property from § 5 (d).

> "Aside from serving as an upper limit to appraisals based on other methods of valuation, another important use for which the best appraisal authorities justify reproduction cost is in the case of so-called 'service properties', that are owned for nonprofit uses and that seldom come on to the market. Churches, club-houses, golf-courses, school and university buildings are of this nature. Neither their market value (if they have any) nor their value to their owners can be estimated by recent sales or by a capitalization of net earnings. In the absence of either of these more reliable tests of value, an appraiser can do little but add the structural costs of the building to the market value of the vacant land, with some arbitrary deductions for physical and functional depreciation. The resulting figure ordinarily sets an upper limit to the worth of the property to the owner, and it roughly measures that value on the assumption that the owner would find it worth while to replace the structures with substantially identical ones in case they were destroyed. * * *" 2 Orgel, *supra*, § 188 at 4.

See also, 4 Nichols, *supra*, § 12.32 at 217-20.

Since the amounts to be paid Concord and Union were agreed upon by stipulation of the parties in the event that the Act were sustained, paragraphs 1 through 9 of the order of the Superior Court of Baltimore City are affirmed. Paragraph 10 is modified to read:

> "The damages in the Calvary Baptist Church of Baltimore condemnation case shall be determined in accordance with Maryland Code (1957, 1967 Repl. Vol.) Art. 33 A § 5(d) to be the reasonable cost of erecting a substantially similar church structure, adjusted for physical and functional depreciation, together with the fair market value of the land."

Order modified and as modified, affirmed. Costs to be paid by appellants.